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RICHARD W. WIEKING
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ACE CAPITAL LTD on it own behalf and on behalf of
Underwriting members of Syndicate 2488

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MHP

ACE CAPITAL LTD on it own behalf and on behalf of Underwriting members of Syndicate 2488 Case No.:

07 4935

Plaintiff,

vs.

STUBHUB, INC.

Defendant.

COMPLAINT FOR DECLARATORY
JUDGMENT

DEMAND FOR JURY TRIAL

COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES the Plaintiff, ACE CAPITAL LTD on it own behalf and on behalf of Underwriting members of Syndicate 2488 ("ACE"), by its attorneys, Cozen O'Connor, and for its Complaint for Declaratory Judgment against the Defendant, STUBHUB, INC. ("StubHub"), alleges as follows:

NATURE OF THE CLAIM

Plaintiff, ACE, brings this action pursuant to 28 U.S.C. §2201 and §2202 for declaratory judgment to determine questions of an actual controversy concerning the respective rights and obligations of ACE and StubHub under the Technology, Internet and Media Professional Liability

1 Insurance Policy, Policy Number SF604690Z (the "Policy"), issued by ACE to StubHub. Pursuant
2 to the Policy, StubHub demanded that ACE provide it with a defense with respect to StubHub's
3 involvement in an underlying litigation, *NPS LLC, et al., v. StubHub, Inc., et al.*, Civil Action No.:
4 06-4874 (Commw. Ct. of Mass) (the "underlying lawsuit").

5 ACE has no duty to defend or other obligations under the Policy because the Policy's
6 Insuring Agreement is not triggered by the underlying lawsuit, which does not constitute a "claim"
7 for "damages" under the Policy that would trigger ACE's duty to defend. According to the clear
8 language in the Policy, the duty to defend is triggered when there is a "claim." The Policy defines
9 "claim" as a civil proceeding, arbitration, mediation, or written demand for "damages." "Damages"
10 means "a compensatory monetary judgment, award or settlement, other than ... disgorgement of
11 profits ... return or offset of fees, charges, or commissions for goods or services already provided ...
12 punitive or exemplary (unless insurable by law) [or] treble ... damages...." Finally, under the
13 Defense and Settlement of Claims provisions, the Policy states that ACE "have the right and duty to
14 defend, subject to the Limit of Liability, Exclusions, and other terms and conditions in this Policy,
15 any **claim** against [StubHub] seeking **damages**...."

16 The only damages sought by the underlying claimants are a permanent injunction precluding
17 StubHub from selling New England Patriots football game tickets and the establishment of a
18 constructive trust containing the trebled amount of StubHub's past revenues generated by sales of
19 New England Patriots football game tickets. These claimed damages are not covered "damages"
20 under the Policy. As such, the underlying lawsuit is not a "claim" and there is no trigger of ACE's
21 duty to defend StubHub in the underlying litigation.

22 PARTIES

23 1. ACE is a United Kingdom corporation that operates through an insurance syndicate at
24 Lloyd's, and is authorized and registered by the Financial Services Authority of the United
25 Kingdom. ACE's principal place of business is in London, England.

26 2. StubHub is believed to be a Delaware corporation with its principal place of business
27 in San Francisco, California. According to its website, www.stubhub.com, StubHub "enable fans to
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1 buy and sell tickets at fair market value to a vast selection of sporting, concert, theater and other live
2 entertainment events, even those that are 'sold out.'" Further, StubHub "provides all fans the choice
3 to buy or sell their tickets in a safe, convenient, and highly reliable environment."

4 **JURISDICTION, VENUE AND INTRA-DISTRICT ASSIGNMENT**

5 3. The Court has jurisdiction over this controversy pursuant to 28 U.S.C. §1332 as there
6 is complete diversity of citizenship between the parties. ACE is a United Kingdom corporation with
7 its principal place of business in London, England, and StubHub is a Delaware corporation with its
8 principal place of business in San Francisco, California. Further, as StubHub already has incurred
9 costs defending the underlying litigation which it has asked ACE to reimburse that are well in excess
10 of \$75,000, the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and
11 costs.

12 4. Venue is proper in this Court pursuant to 28 U.S.C. §1391. The named policyholder
13 under the Policy, StubHub, maintains its principal place of business in this District and a substantial
14 part of the events giving rise to the claims at issue occurred in this District.

15 5. Intra-district assignment to the San Francisco Division of the Northern District of
16 California is proper under Local Rule 3-2(c) as this civil action arises in the county in which a
17 substantial part of the events which give rise to this claim occurred, and because this civil action is
18 not an excepted category to the Court's Assignment Plan.

19 **FACTS AND ALLEGATIONS COMMON TO ALL CLAIMS**

20 **The Underlying Complaint**

21 6. On November 21, 2006, the underlying claimants, NPS LLC ("NPS") and New
22 England Patriots, L.P. ("NEP"), commonly referred to as the "underlying claimants", filed suit in
23 Massachusetts state court against StubHub, a former season ticket holder, a former member of the
24 season ticket wait list, and John Does 1-50. A copy of the underlying complaint is attached hereto
25 and marked as Plaintiff's Exhibit A.

26 7. NPS is believed to a Delaware limited liability company with its principal place of
27 business in Foxborough, Massachusetts. NPS is believed to own Gillette Stadium, the home field of
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1 the New England Patriots football team and is the issuer of premium seating tickets to Patriots home
2 football games. NEP is believed to be a Delaware limited partnership with a principal place of
3 business in FoxBorough, Massachusetts. Further, NEP is believed to be an issuer of general
4 admission and season tickets to New England Patriots football games.

5 8. The underlying claimants allege that StubHub's unlawful resale of premium seating
6 and season tickets to New England Patriot football games "sabotages [the Patriots'] efforts to
7 provide a safe, fan-friendly, affordable environment by failing to disclose material information" in
8 contravention to Massachusetts law. (See Ex. A, paragraphs 31-48). Further, underlying claimants
9 allege that StubHub's conduct violates or induces others to violate Massachusetts Anti-Scalping Law
10 through the unlicensed resale of these tickets at prices that grossly exceed the face value of the
11 tickets. The underlying claimants assert that StubHub's illegal ticket resale activity causes harm to
12 consumers and undermines the Patriots' goodwill with their fans. (See Ex. A, paragraphs 49-58).

13 9. Based on these allegations, the underlying claimants assert the following causes of
14 action against StubHub: (1) intentional interference with advantageous relations (including a claim
15 that StubHub trafficked in fraudulent sales); (2) misappropriation of name under Massachusetts
16 statute; and (3) unfair trade practices act violations. (See Ex A, paragraphs 59-77). NPS also asserts
17 several causes of action against the two individual defendants and 50 unnamed Patriots season ticket
18 holders (hereafter "the season ticket holders") allegedly engaged in the resale of Patriots tickets
19 through StubHub. (See Ex A, paragraphs 78-94). Finally, the underlying claimants assert a claim
20 for the establishment of a constructive trust against all defendants. (See Ex A, paragraphs 95-99).

21 10. The Patriots seek only two elements of damages against StubHub: (1) a permanent
22 injunction barring StubHub from "the illegal and unauthorized resale of Patriots tickets" and (2) the
23 establishment of "a constructive trust containing three times the revenues defendants improperly
24 received and any amount by which defendants were unjustly enriched." (See Ex A, page 18, the
25 WHEREFORE clause).

26 **The Policy**

27

28

11. ACE issued policy number SF604690Z to StubHub for the period effective May 1, 2006 to May 1, 2007. The Limit of Liability for this Policy is \$3,000,000 in the aggregate including Claims Expenses. The deductible is \$75,000 for each claim including Claims Expenses. A copy of the Policy is attached hereto and marked as Plaintiff's Exhibit B.

12. The Policy is a "claims made and notified" policy that limits liability only to those claims that are first made and notified to ACE during the policy period or any extended reporting period, arising from any circumstances which took place on or after any retroactive date specified in the schedule and before the expiry date of the policy period. The Insuring Agreement (Section I) of the Policy provides that:

We shall pay on **your** behalf all **damages** and **claims expenses** within the Limit of Liability in excess of **your** Deductible which **you** become legally obliged to pay as a result of any **claim** arising from any **wrongful act** first made against **you** and notified by **you** to **us** in writing during the **policy period** or any Extended Reporting Period.

13. The Policy wordings at the core of this coverage dispute are the Insuring Agreement quoted above, including the definitions of "claim" and "damages." The definitions of "claim" and "damages" are provided in Section III. Definitions, paragraphs 2 and 6, respectively, which state in relevant part as follows:

Claim means

- (a) a civil proceeding for **damages** commenced by the filing of a complaint or similar pleading; or
- (b) an arbitration or mediation proceeding in which **damages** are sought; or
- (c) a written demand for **damages**; or
- (d) notice by a third party by **you** of circumstances that could reasonably be expected to result in any of the foregoing;

* * * *

Damages means a compensatory monetary judgment, award or settlement, other than;

- (a) **your** future royalties or future profits, restitution, disgorgement of profits, or the costs of complying with orders granting injunctive relief;
- (b) return or offset of fees, charges, or commissions for goods or services already provided or contracted to be provided;
- (c) punitive, exemplary (unless insurable by law), treble or other damages that are assessed in part to punish the defendant or to deter others;

* * * *

14. Under the definitions contained in the Policy and quoted above, in order for a “claim” to be made under the Policy, a claimant must seek “damages” of a kind that fall within the Policy’s specific definition of the “damages” that are included within the scope of the Policy’s coverage grant.

15. In addition to the above Policy language, Section II. Defense and Settlement of Claims, sets forth ACE’s rights and duties in the event of a “claim.” Section II provides as follows:

- (a) It is **our** duty to defend a **claim** against **you** even if such **claim** is groundless or fraudulent however **our** right and duty to defend **you** under this Policy ends when the applicable Limit of Liability has been exhausted by payments of **damages** or **claims expenses**.
- (b) **We** have the right and duty to defend, subject to the Limit of Liability, Exclusions, and other terms and conditions in this Policy, any **claim** against **you** seeking **damages** including injunctive or other non-monetary relief first made against **you** and notified to **us** during the **policy period** or any Extended Reporting Period, for any **wrongful act** first committed by **you** on or after any **retroactive date** and before the end of the **policy period**.
- (c) **You** may not make any payment (except at **your** own cost), assume any obligation, or incur any expense in relation to a **claim** without **our** written consent, provided that such consent may not be unreasonably withheld. Only reasonable and necessary costs will be paid.
- (d) **We** have the right to select and appoint defense counsel to defend any **claim** notified under this Policy. If **you** have appointed defense counsel, at **our** request **you** shall instruct them to turn over all their relevant files, materials and work product and co-operate with counsel who **we** select and appoint as defense counsel.
- (e) **We** have the right to investigate and settle any **claim** in the manner and to the extent that **we** believe is proper unless the total cost of **damages** and **claims expenses** is less than the amount remaining within **your** Deductible. If **you** refuse to consent to any settlement or compromise recommended by **us** which is also acceptable to the claimant and then elect to contest the **claim**, **our** liability for any **damages** and **claims expenses** shall not exceed the amount for which the **claim** could have been settled, less the remaining Deductible, plus the **claims expenses** incurred up to the time of such refusal, or the applicable Limit of Liability, whichever is less, and **we** shall have the right to withdraw from further defense by tendering control of said defense to **you**.

16. The Choice of Law provision in the Policy (Section V. General Conditions, subsection H) provides as follows: “For all purposes, this Policy shall be interpreted according to

1 the law in Illinois which conflict of law principles shall not be used to adopt the law of other states in
2 the United States.”

3 17. Finally, the Policy contains a Dispute Resolution provision (Section V. General
4 Conditions, subsection N). This provision provides as follows:

5 The parties shall attempt in good faith to resolve any dispute arising out of or relating
6 to this Policy promptly by negotiation. If the dispute has not been resolved by
7 negotiation within forty-five (45) days of the disputing party's notice, either party
8 may demand that the dispute be submitted for non-binding resolution under the then
9 current CPR Model Mini-Trial Procedures in effect on the date of this agreement.
10 Unless otherwise agreed, the parties will select a mini-trial neutral advisor from the
11 CPR Panels of Neutrals and shall notify CPR and request CPR to initiate the selection
12 process. All applicable statutes of limitations and defenses based upon the passage of
13 time shall be tolled while the procedures specified herein are pending. The parties
14 will take such action, if any, required to effectuate such tolling.

15 The parties agree that no suit will be filed by either party against the other party
16 seeking resolution of any dispute arising out of or relating to this Policy until the
17 parties have (1) attempted to negotiate a resolution, (2) completed the non-binding
18 CPR Mini-Trial proceeding through decision, and (3) thirty days have elapsed since
19 the conclusion of the non-binding CPR Mini-Trial proceeding

20 18. Instead of proceeding with the CPR Mini-Trial proceedings set forth in the Policy, the
21 parties agreed to pursue mediation. However, the parties agreed that all other terms in the Dispute
22 Resolution provision remain in effect.

23 **Notice of the Claim and ACE's Reservation of Rights**

24 19. StubHub provided notice of this lawsuit to ACE on November 28, 2006.

25 20. Following ACE's initial investigation of this matter, on January 12, 2007, ACE
26 issued a reservation of rights letter to StubHub. This correspondence advised StubHub that ACE's
27 investigation of this situation is continuing, that ACE generally reserves all of its rights, remedies,
28 and defenses, and that there are certain aspects of this matter that may not be covered under the
Policy. A copy of ACE's January 12, 2007 coverage correspondence is attached hereto and marked
as Plaintiff's Exhibit C.

21 21. After further investigation and analysis, on May 3, 2007, ACE issued supplemental
22 coverage correspondence. ACE advised StubHub that the Policy does not provide coverage for the

1 underlying claimants' lawsuit because the underlying complaint does not allege a "claim" or
2 "damages" as those terms are defined in the Policy, since the underlying claimants only seek
3 uncovered damages, or permanent injunctive relief and the establishment of a constructive trust
4 containing three times the amount of StubHub's revenues. Therefore, ACE informed StubHub that
5 ACE's right and duty to defend under the Policy was not triggered by the underlying lawsuit. A
6 copy of ACE's May 3, 2007 supplemental coverage correspondence is attached hereto and marked
7 as Plaintiff's Exhibit D.

8 22. Nevertheless, in good faith, ACE stated that it would continue to pay StubHub's
9 reasonable defense costs in accordance with the Policy, ACE's Litigation Management Guidelines,
10 and prior telephone and email communications with StubHub until the coverage issues are resolved.
11 ACE informed StubHub that unless it were to withdraw this claim, ACE would invoke the Policy's
12 dispute resolution provision, set forth in Section N of the Policy. ACE also reserved its right to
13 recoup defense costs if it ultimately is determined that ACE had no duty to defend or indemnify
14 StubHub. (See Ex D).

15 **StubHub's Response to ACE's Coverage Position**

16 23. On June 14, 2007, StubHub responded and objected to ACE's coverage position. A
17 copy of StubHub's response to ACE's coverage position is attached hereto and marked as Plaintiff's
18 Exhibit E.

19 24. In its June 14, 2007 correspondence, StubHub argued that this matter constitutes a
20 "claim" or circumstances that could give rise to a "claim" since each cause of action asserted against
21 StubHub in the underlying complaint "*potentially* seeks the recovery of damages." StubHub also
22 asserted that ACE withdrew its defense and denied coverage and that StubHub was prejudiced by
23 this alleged conduct. (See Ex E).

24 **ACE's Reply to StubHub's Response/Objections**

25 25. On June 20, 2007, ACE replied to StubHub's response. A copy of ACE's June 20,
26 2007 reply correspondence is attached hereto and marked as Plaintiff's Exhibit F.

1 26. In its June 20, 2007 correspondence, ACE restated its coverage position that the
2 underlying complaint against StubHub does not allege a "claim" or "damages" as those terms are
3 defined in the Policy. Regarding StubHub's assertion that the underlying complaint "potentially
4 seeks the recovery of damages," ACE advised that StubHub failed to recognize that the term
5 "damages" has a specific meaning under the Policy, and that based on the express Policy definition,
6 the underlying complaint fails to seek any damages that potentially could fall within the Policy's
7 coverage grant. Further, ACE stated that not only is the case law relied on by StubHub factually
8 distinguishable, but the cases cited by StubHub are inapplicable because they do not interpret or
9 otherwise apply the specific and unique Policy wording at issue here, which has never been
10 interpreted by a court of law. As for StubHub's comments concerning ACE's alleged conduct, ACE
11 reminded StubHub that it has acted in good faith throughout this dispute, and has agreed to continue
12 defending StubHub pending resolution of the coverage dispute. ACE also disputed StubHub's
13 assertion that StubHub somehow has been prejudiced by ACE's conduct, since StubHub has not
14 been denied effective counsel and has never been asked by ACE to alter or forego any of its defense
15 or settlement strategies. (See Ex F).

16 **Parties Comply with the Policy's Dispute Resolution Provisions**

17 27. On August 24, 2007, a non-binding mediation proceeding was conducted in Chicago,
18 Illinois, pursuant to the terms of the Policy and agreement of ACE and StubHub. The mediation was
19 unsuccessful, and did not result in a settlement of the coverage dispute between the parties.

20 28. The Policy calls for a 30 day "cooling off" period following the conclusion of the
21 dispute resolution proceedings. During this time period, the parties made additional attempts to
22 resolve this dispute. This 30 day "cooling off" period expired on September 24, 2007.

23 Unable to reach resolution, ACE now brings this action for a declaration of rights under the Policy.

24 **DECLARATORY RELIEF**

25 **CLAIM OUTSIDE OF GRANT OF COVERAGE**

26 29. ACE restates and re-alleges Paragraphs 1 through 29 as and for its paragraph 30 of its
27 claim for Declaratory Relief as though fully set forth herein.
28

1 30. StubHub seeks professional liability insurance coverage from ACE as provided by
2 Policy Number SF604690Z with regard to StubHub's involvement in the underlying lawsuit.

3 31. The Policy's Insuring Agreement provides in relevant part that ACE shall pay
4 StubHub all "damages" and "claims expenses" within the Limit of Liability in excess of StubHub's
5 deductible, which StubHub becomes legally obligated to pay as a result of any "claim" arising from
6 any "wrongful act" first made against StubHub and notified to ACE during the policy period. Thus,
7 to fall within the scope of the Policy's coverage grant, a "claim" for "damages" as those terms are
8 defined in the Policy, must be presented.

9 32. The Policy defines "claim" as a civil proceeding, arbitration, mediation, or written
10 demand for "damages." Thus, under the Policy's definition of "claim," no "claim" exists unless the
11 underlying claimant seeks "damages" as specifically defined in the Policy.

12 33. The Policy defines "damages" as "a compensatory monetary judgment, award or
13 settlement, other than ... disgorgement of profits ... return or offset of fees, charges, or commissions
14 for goods or services already provided ... punitive or exemplary (unless insurable by law) [or] treble
15 ... damages...."

16 34. The only damages sought in the underlying lawsuit by the underlying claimants are:
17 (1) a permanent injunction; and (2) the establishment of a constructive trust containing the trebled
18 amount of StubHub's past revenues. Thus, the damages claimed in the underlying lawsuit do not fall
19 within the scope of specifically defined "damages" for which the Policy grants coverage.

20 35. The constructive trust containing the trebled amount of StubHub's past revenues
21 sought by the underlying claimants expressly is not included within the specifically defined
22 "damages" for which the Policy grants coverage, because the Policy clearly provides that "damages"
23 do not include any restitution, disgorgement of profits, the return of fees, charges, or commissions,
24 and/or punitive, exemplary, or treble damages.

25 36. The injunctive relief sought by the underlying claimants similarly is not included
26 within the specifically defined "damages" for which the Policy grants coverage, because injunctive
27 relief does not constitute a "compensatory monetary judgment, award or settlement."
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1 37. Because neither the injunctive relief nor the constructive trust sought by the
2 underlying claimants constitute the specifically defined "damages" for which the Policy grants
3 coverage, the underlying lawsuit does not constitute a "claim" for "damages" that would trigger
4 ACE's duty to defend the underlying lawsuit.

5 38. Accordingly, ACE requests a declaration of its rights and obligations under the
6 Policy, and specifically requests a determination that it owes no duty to defend or indemnify
7 StubHub in connection with the underlying lawsuit, because the underlying lawsuit does not
8 constitute a "claim" for "damages", and as such, the Policy is not obligated to respond.


9 WHEREFORE, the Plaintiff, ACE CAPITAL LTD on it own behalf and on behalf of
10 Underwriting members of syndicate 2488, requests this Court to enter an Order granting the
11 following relief:

- 12 A. Declaring the respective rights and obligations, if any, of the parties under the Policy
13 at issue;
- 14 B. Declaring that ACE does not have any obligation to defend or indemnify StubHub
15 under the Policy with regard to the underlying lawsuit;
- 16 C. Awarding all costs and disbursements of this action, including reasonable attorney's
17 fees incurred by ACE;
- 18 D. Ordering StubHub to reimburse ACE for all defense costs paid to StubHub pending
19 resolution of this coverage dispute; and
- 20 E. Awarding any and all other relief this Court deems appropriate and just.

21 Dated: September 24, 2007

Respectfully submitted,

COZEN O'CONNOR

24 
25 Daniel D. Harshman
26 Counsel for ACE CAPITAL LTD
27 on it own behalf and on behalf of Underwriting
28 members of Syndicate 2488

DEMAND FOR JURY TRIAL

ACE Capital Limited on its own behalf and on behalf of Underwriting members of Syndicate 2488 demands a trial by jury on all issues so triable.

Dated: September 24, 2007

Respectfully submitted,

COZEN O'CONNOR



Daniel D. Harshman
Counsel for ACE CAPITAL LTD
on its own behalf and on behalf of Underwriting
members of Syndicate 2488

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